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A Constitution of Social Governance for the European Union

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A constitution of social governance for the European Union

*Dagmar Schiek**

Abstract

This chapter considers the EU's socio-economic constitution under the lens of humanness. It argues that the EU's unique socio-economic constitution demands equilibrium of socio-economic integration instead of widening the gap between economic integration at EU levels and social integration at national levels. While the EU lacks the legislative competences to achieve this equilibrium, the constitutional principle still prevails. Indeed, the EU competences reflect its own values as well as the socio-economic constitutions of its constituent Member States. These frequently do not allow for total state-governance of social spheres such as working life, education, care or other social services. Instead, societal actors are given scope to (co-)govern these spheres at national levels. Accordingly, the apparent tension between the EU's socio-economic values and principles and its limited competences in the social policy field can be resolved through a dynamic interpretation of the EU Treaties towards a "constitution of social governance". This interpretation reads the Treaties as authorising governance by societal actors. The chapter connects the idea of humanness to the ideals of social governance at EU level and proposes two options for practical application of the concept. These are rules for trans-national labour markets based on European collective labour agreements and a European higher education sector developed by agreements between universities.

Key words

- Social governance
- Trans-national collective labour agreements
- European higher education sector
- New economic governance
- Market determinism
- Neo-liberal drift
- austerity

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Introduction

This chapter contests the increasingly familiar narrative that the EU's neoliberal orientation can only be conquered by defending national arenas for social policy.¹ The chapter argues that the EU's unique socio-economic constitution demands equilibrium of socio-economic integration instead of widening the gap between economic integration at EU levels and social integration at national levels.² The lack of a complete set of competences on the part of the EU institutions to achieve this equilibrium cannot question this constitutional obligation. Indeed, this lack of competences reflects the EU's values as well as the socio-economic constitutions of its constituent Member States. These frequently do not allow for total state-governance of social spheres such as working life, education, care or other social services. Instead, societal actors are given scope to (co-)govern these spheres at national levels. Accordingly, the apparent tension between the EU's socio-economic values and principles and its limited competences in the social policy field can be resolved through a dynamic interpretation of the EU Treaties towards a "constitution of social governance". This interpretation reads the Treaties as authorising governance by societal actors.³

This concept links well with the theme of this collection: a constitution of social governance can be viewed as a proposal for a humane way of socio-economic integration. While humaneness can be read in many ways, the interconnectedness of human beings is taken as a starting point here. As a first step, we consider the potential of 'humaneness' enshrined in the EU's normative base and its unique model of regional economic integration. The normative demands of this humane socio-economic constitution are then compared, and indeed contrasted, with the EU's practice, summarising processes of decoupling of economic and social integration through judicial governance of the internal market and the EU's new economic governance introduced after the global economic crisis. In a third step, the demands of re-nationalising social policy from the EU and in academia are exposed as unsuitable, and two practical examples of the how the constitution of social governance can serve as a basis for alternatives are developed.

¹ See for example D Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', *European Law Journal*, 19 (2013), 303-24, F Rödl, 'Zu Begriff und Perspektiven demokratischer und sozialer Union', in J Bast and F Rödl (eds) *Wohlfahrtsstaatlichkeit und soziale Demokratie in der Europäischen Union*, (Baden-Baden: Nomos, 2013), pp. 179-205, F Scharpf, 'Monetary Union, Fiscal Crisis and the Pre-emption of Democracy', *Zeitschrift für Staats- und Europawissenschaften*, 9 (2011), 163-98.

² U Liebert, 'Reconciling market with Social Europe? The EU under the Lisbon Treaty', in D Schiek, U Liebert and H Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2011), pp. 47-73, D Schiek, 'Re-embedding economic and social constitutionalism: normative perspectives for the EU', in *European Economic and Social Constitutionalism* (2011) pp. 17-46, Idem *Economic and Social Integration: the Challenge for EU Constitutional Law* (Cheltenham: Edward Elgar, 2012).

³ Schiek, 'The EU Constitution of Social Governance in an Economic Crisis: in Defence of a Transnational Dimension to Social Europe', *Maastricht Journal of Comparative and European Law*, 20 (2013), 185-208.

A humane socio-economic constitution for the EU?

In contrast to its public perception, and current practice, the EU's socio-economic model is constituted as deeply humane. Far from being an endeavour by states and other public bodies, the European Economic Community was conceived as a medium to promote human interaction and interrelation as the basis for peace in Europe. The socio-economic realm is the heart of this mission: as ingeniously condensed in the Schuman declaration,⁴ it was founded on the belief that interaction of people on markets would bring about an ever closer union of Europe's peoples. Interconnectedness of people was thus already engrained in the EEC's socio-economic constitution.

Apart from being at the heart of African and Asian human rights philosophy,⁵ the interconnectedness of human beings is also a recurrent theme in Western philosophical thought. Susan Babbitt establishes in a fascinating way how indeed Chinese and Buddhist thought, some Christian scholars and Marxist reasoning convene on the interaction between mind and bodies, humans with each other and the wider environment as the basis for humanism.⁶ Accordingly, the often demonised culture of rights, which allegedly is introduced by European integration into spheres where it was formerly unknown,⁷ is not necessarily tied to individualism and isolation. Human rights are meant to enable us to self-govern our lives. Self-governance as a societal activity rests on being interconnected with other human beings as well as with the wider animate and non-animate environment. Feminist and environmentalist perspectives on human rights contribute to such an interconnected vision of human rights in general.⁸

If interaction between persons, in unmitigated form, is an important aspect of humanness, the scope for such interaction at European levels is a measure for the humanness of the EU. The EU's objectives, aims and values indicate that such interaction is at the centre of its mission. The EU was established for the sake of 'elimination of barriers that divide Europe' (Preamble TEU) and the 'promotion of peace (...) and the well-being of (...) peoples' (Article 3 (1) TEU). Accordingly the current preambles of

⁴ It is worthwhile repeating the reference to interaction among people as the base of European integration in the well-known declaration: "Europe will be (...) built through concrete achievements, which first create a de facto solidarity. (...) The French Government proposes to place Franco-German production of coal and steel under a common „High Authority“ (...) The solidarity in production thus established will (...) lay the real foundations for their [the Member States'] economic unification" [cited from European Parliament, *Selection of Texts Concerning Institutional Matters of the Community for 1950-1982* (Luxembourg: Office for Official Publications of the European Communities, 1982) (p. 47).]

⁵ See for more detail in the introductory chapter ###

⁶ S Babbitt, 'Humanism and Embodiment: Remarks on Cause and Effect', *Hypatia*, 28 (2013), 733-48.

⁷ See, for example, D Mabbet, 'The Development of Rights-based Social Policy in the European Union: The Example of Disability Rights', *Journal of Common Market Studies*, 43 (2005), 97-120, and D Kelemen, *Eurolegalism. The Transformation of Law and Regulation in the European Union* (Cambridge (Massachusetts): Harvard University Press, 2011).

⁸ For the classical feminist critique of human rights constrained by male individualism see S Moller Okin, 'Equal Citizenship: Gender, Justice and Gender: An unfinished debate', *Fordham Law Review*, 72 (2004), 1537-67, from an environmental perspective A Grear, 'Towards 'climate justice'? A critical reflection on legal subjectivity and climate injustice: warning signals, patterned hierarchies, directions for future law and policy', *Journal of Human Rights and the Environment*, 5 (2014), 103-33.

the Treaties stress the ever closer union of peoples, not of states. The EU's values combine freedom and solidarity with sustainability, both in an ecological and a socio-economic dimension. (Article 3 TEU) Its commitment to human rights has been characterised as associative, its notion of freedom as social.⁹

Since the EU, at the same time, also is committed to establishing an internal market (Article 26 TFEU), this market can never be "free" in the sense of providing no limits to extracting profit. Instead, the EU is committed to a social market economy, i.e. an economy where markets are constituted in such a way that they maximise social integration. The EU's value determine the direction which the social market economy is meant to take. All this implies that the EU's socio economic constitution, does not entertain artificial divisions between the social and the economic.

This is expressed in the structure of the internal market, and in particular in the set of four economic freedoms which are constitutive of this institution (Article 26 TFEU). In contrast to most regional integration endeavours, the EU internal market comprises free movement of persons as an independent category. Granting persons an individual right to move freely creates an inextricable link between the internal market and societies in that it promotes – in the words of the Court of Justice - the "economic and social interpenetration"¹⁰ of the EU. The guarantee of free movement of persons links this social interpenetration to the interconnectedness of people. The special quality of this interconnectedness is achieved by guaranteeing free movement of persons under the condition of equal treatment in the host state. Free movement as such allows persons to share the gains of the internal market, by seeking the highest wages, safest working conditions, best housing provision and education systems as well as environmental conditions in the internal market. Only if free movement is tied to equal treatment, migrant labour will not have to compete by lower wages. Without that protection, migrants as newcomers, whose qualification is frequently not accepted as equal in practice, and who are not familiar with conditions in their host country, will often be disadvantaged, thus practically competing by price. Given the paradoxes of the labour market,¹¹ any section of the labour market starting to compete with low wages initiates a downward spiral of employment conditions. Similarly, if newcomers

⁹ I Manners, 'The normative ethics of the European Union ', *International Affairs*, 84 (2008), 65-80.

¹⁰ This term has first been used in the Manpower case, related to free movement of workers (case 35/70 [1970 ECR 1251, paragraph 10), and subsequently in the Reyners case, on freedom of establishment (case 2/74 [1974] E.C.R 631), in which field it is routinely repeated (see for example, C-97/09 Schmelz [2010] and C-48/11, ECLI:EU:CL2012:485, paragraph 25).

¹¹ The structural imbalance or fallacy of labour markets (see W Stützel, *Marktpreis und Menschenwürde [Market Pricing and Human Dignity]*, 2nd edn (Stuttgart: Bonn Aktuell, 1982) results from the facts that workers and self-employed persons lacking significant capital ownership do not have any alternative to offering their labour on markets. Thus, if wages fall, they will not withhold their labour, but instead expand its supply, for example by taking on a second occupation or work on overtime. The dysfunctionality of establishing an ideal price by supply and demand is thus particularly pronounced on labour markets, leading even pro-market ideologues to support a functioning system of collective bargaining, underpinned by credible threats of collective industrial action B. E Kaufmann, 'Labor's Inequality of Bargaining Power: Changes over Time and Implications for Public Policy', *Journal of Labor Research*, 10 (1989), 285-98., with references to Adam Smith, Marshall and Pigou.

are excluded from provisions of the social state, including benefits, social housing, access to education and healthcare, sub-standard existence gains in acceptance, threatening those in a weak socio-economic position in particular. Only if equal treatment of free moving workers is maintained, a process of upward spiralling of wages and social conditions can result from its exercise.

This section has shown that the EU's present socio-economic constitution as provided in the Treaties is based on interaction of people, and thus is suitable to establish a humane internal market. However, while humaneness may be the EU's programme, the practical implementation of the EU's socio-economic integration project presently fails to institute humaneness.

The EU's failure to live up to its socio-economic model

Practical prevalence of market determinism and austerity

In practice, the EU is frequently criticised as having created an irreversible dominance of market determinism over social values.

From the 1990,¹² the decoupling of economic integration and social policy was described as an empirical fact: the EEC had been based on the idea of embedded liberalism¹³, and accordingly economic integration at European level was accompanied, complemented and balanced by national level social policy. The reports by Spaak and Ohlin, promoting establishing a common market between the original six Member States, suggested that promoting such economic integration while maintaining national social systems would bring about the desired improvement of living and working conditions without any elaborated EU social policy. The radicalised decoupling hypothesis suggests that this decision is not only irreversible, but that the EU has also re-focused on a neo-liberal consensus, abandoning embedded liberalism. This critique suggests that the EU now strives actively for a dismantling of national social policies and pursues a new neo-liberal constitutional settlement.¹⁴ Some suggest that this is conditioned by the recent global economic crisis,¹⁵ while others blame the construc-

¹² F Scharpf, 'The European Social Model: coping with challenges of diversity', *Journal of Common Market Studies*, 40 (2002), 645-70.

¹³ D Ashiagbor, 'Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration', *European Law Journal*, 19 (2013), 303-24.

¹⁴ D Ashiagbor, as last footnote, M Höpner and A Schäfer, 'A New Phase of European Integration: Organised Capitalism in Post-Ricardian Europe', *West European Politics*, 33 (2010), 344-68, Ch Joerges and F Rödl, 'Informal politics, formalised law and the 'social deficit' of European integration: reflections after the judgments of the ECJ in Viking and Laval', *European Law Journal*, 15 (2009), 1-19, F W Scharpf, 'The asymmetry of European integration, or why the EU cannot be a "social market economy"', *Socio-Economic Review*, 8 (2010), 211-50, W Streeck, *Gekaufte Zeit. Die vertagte Krise des demokratischen Kapitalismus* (Berlin: Suhrkamp, 2013).

¹⁵ St Giubboni, 'European Citizenship and Social Rights in Times of Crisis', *German Law Journal*, 15 (2014), 935-64, J Habermas, 'The Crisis of the European Union in the Light of a Constitutionalization of International Law', *The European Journal of International Law*, 23 (2012), 335-48, F Rödl, 'Zu Begriff und Perspektiven demokratischer und sozialer Union', in J Bast and F Rödl (eds) *Wohlfahrtsstaatlichkeit und soziale Demokratie in der Europäischen Union* (Baden-Baden: Nomos, 2013), pp. 179-205.

tion of the EMU as the cause, since it decoupled the common currency from socio-economic politics.¹⁶

While – as will be argued below – the cleavage between the EU’s economic bias and its social values may be bridgeable, it is difficult to contradict the critique of the present state of the EU socio-economic integration project. However, the present state does not necessarily determine the EU’s future. It will be argued that the EU’s failure to live up to its ideals is based on a limited understanding of the internal market as well as on unnecessarily restrictive approaches to economic and monetary union.

The internal market mis-read – the alleged neoliberal thrift

The left-wing critique suggests that the Union drifts towards a neo-liberal polity and effectively dis-embeds the internal market at EU levels from social integration project pursued at national levels. It is based on observing the dynamic interaction of the Court of Justice and the EU Commission in pursuing the internal market project.

One decisive key to understanding this dynamic is the exceedingly strong role of the Court of Justice, which rests on the supranational character of EU law as well as on the Court’s monopoly for interpreting positive EU law and finding general principles of EU law beyond the written law.¹⁷ By its own case law the Court has created a strong competence of judicial governance, which escapes the constraints of the EU’s legislative competences. These constraints rest on the principle of conferral and on the EU’s duty to respect the Member States’ national identities (Articles 4 and 5 TEU). The Court is not so constrained: it has the power to control the compatibility of any national law, any behaviour of non-state actors at national level and the EU legislation with Treaty law. These judicial competences,¹⁸ must thus be reckoned with in the EU competence catalogue.

The Court’s interpretation of the hard law of the internal market, consisting of the directly effective economic freedoms and competition rules, has a pivotal role in defining these competences, and at the same time in shaping the scope for social policy within the EU socio-economic model. The left-wing critique of the Court’s case law has surged only after 2007, when the Court decided two cases in which the rights of workers organised in trade unions seemed to clash with the rights of business to achieve

¹⁶ P Whyman, M Baimbridge and A Mullen (eds) *The Political Economy of the European Social Model* (New York: Routledge, 2012).

¹⁷ While there is a textual basis for the Court’s tasks (now: Article 19 TEU), the doctrine of EU law’s autonomy, the Court’s monopoly to interpret the positive law and to find general principles as well as the primacy and direct effect of EU law have been shaped by the Court’s case law, which continues as the sole source of these decisive doctrines: declaration number 17 to the Lisbon Treaty, without any legally binding force of its own, states “The Conference recalls that in accordance with settled case law of the Court of Justice of the European Union the Treaties and the Law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by said case law”. The fiftieth anniversary of the ground-breaking rulings *van Gend* (case 26/62 [1963] ECR 1) and *Costa* (case 6/64 [1964] ECR 585) has provoked some academic writing (see, for example, H Ruiz Fabri, G F Sinclair and A Rosen (eds), *Revisiting Van Gend En Loos*” (Paris: Societe de Legislation Compare, 2014).

¹⁸ For more detail see D Schiek (footnote 3Error! Bookmark not defined.), at 189-90, *Idem* (footnote 1Error! Bookmark not defined.) at 227-28.

lower wages through relocating or posting workers across an EU border.¹⁹ However, authors who have consistently observed the Court's case law on collective labour rights had already seen the potential conflict as early as 1998, and had the dubious satisfaction of seeing their predictions come true.²⁰

Overall, the left-wing critique of the law of the internal market is two-pronged: it consists of a procedural and a substantive dimension.

In its procedural dimension, it challenges the consequences of direct effect and supremacy for the survival of national social policy and the creation of EU level equivalent. Those doctrines allow any individual economic actor to challenge such national social policy with which they (no longer) agree as incompatible with EU law, while it is structurally difficult for the European Union to create such social policy instruments which can serve as a functional equivalent to those national social policies which are declared as conflicting with EU law. Scharpf's critique is based on his main research interest in "joint decision traps" and focuses on the limits which judicial governance²¹ draws for the European Union to develop social policy: while a small lobbying group can establish a line of CJEU case law effectively outlawing national (social) policy, achieving a consensus for enacting equivalent social legislation at EU level borders at the impossible. While Scharpf initially remained optimistic for EU level social policy and suggested ways to achieve it, he later on concluded that the EU could never develop into the social market economy which its Treaties demand it to become.²² Legal scholars whose work is situated in the tradition of preferring procedural over substantive justice have taken this critique as a starting point for their demand of rescinding

¹⁹ The so-called "Laval quartet" comprises four CJEU cases related to tensions between economic freedoms and collective industrial action as well as protection of wages under national collective agreements and/or legislation (Case C-341/05 Laval [2007] E.C.R. I-11767; Case C-438/05 Viking [2007] E.C.R. I-10779, Case C-346/06 Rüffert [2008] E.C.R. I-01989 and Case C-319/06 Commission v. Luxembourg [2008] E.C.R. I-04323). The expansive academic debate of these rulings is beyond any single footnote. It continues in dedicated edited collections, including A Bucker and W Warneck (eds), *Viking - Laval - Rüffert: Consequences and Policy Perspectives* (Brussels: European Trade Union Institute, 2010); M Freedland and J Prassl (eds), *Viking, Laval and Beyond*, 1st edn (Oxford: Hart, 2015).

²⁰ The Court already engaged with the potential conflict of collective labour rights and economic freedoms in 1997, when it held that France had to intervene to prevent farmers from taking collective action against imports of Spanish tomatoes and strawberries, although their action was protected by constitutional labour rights in France. Academics who already foresaw the wider potential impact on industrial relations then were numerous (e.g. J Kühling, 'Staatliche Handlungspflicht zur Sicherung der Grundfreiheiten', *Neue Juristische Wochenschrift*, 52 (1999), 403-04, P Szczekalla, 'Grundfreiheitliche Schutzpflichten - eine neue Funktion der Grundfreiheiten des Gemeinschaftsrechts', *Deutsches Verwaltungsblatt*, 118 (1998), 219-24, K Muylle, 'Angry farmers and passive policing: private conduct and the free movement of goods', *European Law Review*, 23 (1998), 467-75, G Orlandini, 'The free movement of goods as a possible "Community" limitation on industrial conflict', *European Law Journal*, 6 (2000), 341-62; though few authors drew the line from Commission v France to Viking and Laval (see for one of the exceptions G Orlandini, 'Trade Union rights and market freedoms: the European Court of Justice sets out the rules', *Comparative Labour Law & Policy Journal*, 29 (2008), 573-603).

²¹ Scharpf preferred the term judicial legislation ('The Joint-Decision Trap Revisited', *Journal of Common Market Studies*, 44 (2006), 845-64 (p. 853).

²² F Scharpf as in footnote 1.

the direct effect and supremacy of EU law, and to replace these time honoured principles of EU integration by a conflicts of law regime.²³

If we focus on the substantive demands of the EU's normative commitments, a mere procedural critique of judicial governance is bound to miss its aim. The substantive critique of the interrelation of economic freedoms and competition law on the one hand, and social policy on the other hand seems far more important.²⁴ From these substantive perspectives, the content of the economic freedoms and competition law as shaped by the Court of Justice becomes decisive, as well as the Court's position towards policies promoting social justice at national and EU levels. Here the critique culminates in the suggestion that the case law on the hard law of the internal market challenges the EU social model.

According to the embedded liberalism model, the European Social Model rests on the functioning of the Member States' social models. While these national social models diverge,²⁵ they converge on a normative common core: societies are responsible for individuals' well-being, and discharge of this responsibility by providing transferred income for periods of loss of (employment-based) self-sufficiency, by maintaining institutional social services as well as correcting imbalances in markets through regulation, which in labour markets is partly based on collective bargaining underpinned by credible threats of industrial action.²⁶ Substantively, economic freedoms and competition law as interpreted by the Court become the yard stick for judging the national emanations of the European Social Model.

Such judgments should not, however, outlaw the European social model, if guided by the Treaty. As indicated initially, the economic freedoms are contradictory in so far as free movement of workers (and also of self-employed persons who only sell their own

²³ C Joerges, 'The Idea of a Three-Dimensional Conflicts of Law as Constitutional Form', *RECON On-line working papers*, 5 (2010), 1-37, M Everson and C Joerges, 'Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism', *European Law Journal*, 18 (2012), 644-66.

²⁴ S Giubboni, *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective* (Cambridge: CUP, 2006), D Schiek (as footnote 1Error! Bookmark not defined.), P Syrpis, *EU Intervention in Domestic Labour Law* (Oxford: Oxford University Press, 2007).

²⁵ For sociological approaches to classifications see G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990). and M Ferrera, *The Boundaries of Welfare. European Integration and the New Spatial Politics of Social Protection* (Oxford: Oxford University Press, 2005), for an overview of different national models see W A. Arts and J Gelissen, 'Models of the Welfare State', in Francis Castles and others (eds) *The Oxford Handbook of the Welfare State* (Oxford: Oxford University Press, 2010), pp. 569-83.

²⁶ D Schiek, 'The European Social Model and the Services Directive', in Ulla Neergaard, Ruth Nielsen and Lynn Roseberry (eds) *The Services Directive - Consequences for the Welfare State and the European Social Model* (Copenhagen: DJØF Publishing, 2008), pp. 25-63 (p. 38), idem, 'The EU's socio-economic model(s) and the crisi(e)s - any perspectives?', in D Schiek (ed) *The EU Economic and Social Model in the Global Crisis* (Farnham: Ashgate, 2013), pp. 8-30 (pp. 3-4). More recently, D Vaughan-Whitehead distinguished six institutional pillars of the European Social Model: increased minimum rights on working conditions, sustainable universal social protection systems, inclusive labour markets, strong and well-functioning social dialogue, public services and services of general interest and social inclusion and cohesion ('The European Social Model in Times of Crisis - an Introduction', in idem (ed) *The European Social Model in Crisis: Is Europe Losing its Soul?*, (Cheltenham: Edward Elgar, 2015), pp. 1-65).

services) underpins EU level social rights to enjoy equal treatment in the host states, which constitutes an element of the EU social model in itself. However, economic freedoms also enhance the position of business. The Court's reading of free movement of goods and freedom to provide services and of freedom of establishment for companies has constitutionalised the economic freedoms as rights to cross-border market access for business across borders. Free movement of goods serves is triggered by any state rule which may potentially or actually impact on trans-border trade,²⁷ while free movement of persons and services serves as defence against state and non-state activity, and precludes any measure "which might place EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State".²⁸ If national labour standards, social security provisions or rights to take collective industrial action fall under the hammer of internal market case law in one Member State, this has knock-on effects in so far as free movement of business throughout the internal market creates the so called regulatory competition.

These potentially negative tendencies are not, without counterweights. The Court has progressively expanded the potential justifications for restrictions of economic freedoms.²⁹ The reasons for this can be read as a certain regulatory vision: in the absence of EU level legislation, the economic freedoms do not render all differences between national regulatory environments inadmissible. Instead, restrictions resulting from such differences can be justified by reference to any general interest. In parallel the EU itself must take general interests into account when creating legislation in the internal market (Article 114, 115 TFEU). Legislating for so-called non-economic interests³⁰ is thus not the exception, but should constitute the rule in internal market legislation. The general interests the EU must safeguard include some elements of the EU social model, though mainly legislation for social rights should be based on Article 153 TFEU as well as on Article 47 TFEU as far as the coordination of social security systems is concerned. Read in this way, the law of the internal market itself precludes any undistorted competition of legal orders, and provides a framework in which national social models can be safeguarded.³¹ However, the critique of the judge-made economic constitution is correct in so far as the general interests, including those supporting the EU social models, only enter the play as justifications, while the economic freedoms do not require any justification. Social standards are systematically on the back foot if pursued at national levels.

From an internal market perspective, this is a logical consequence of the potentially disrupting effects of differences between national regulatory models: if business needs to comply with 28 different standards, transnational activity is less likely to

²⁷ CJEU case C-573/13 Ålands Vindkraft ECLI:EU:C:2014:2037, paragraph 66, with reference to case 8/74 Dassonville ECLI:EU:C:1974:82 paragraph 5.

²⁸ CJEU Case C-202/11 LAS ECLI:EU:C:2013:239, paragraph 19.

²⁹ The recent Ålands Vindkraft case (footnote 27) can serve as an example: the Court allowed Member States to use environmental protection as a justification of discriminatory restrictions on imports.

³⁰ B de Witte, 'Legislating for non-economic interests', in P Syrpis (ed) *EU Judiciary and Member States*, (Oxford: Hart, 2012), pp. 25-46.

³¹ D Schiek, above footnote 26.

emerge. Thus, the internal market perspective seems to suggest that any European Social Model would have to be progressively realised by EU level rules. However, these rules are not likely to emerge. First, in the wake of decades of preaching de-regulation, the political will to provide EU level social standards has been weakened considerably. The 2015 work programme of the EU Commission, accordingly, contains many more measures in the social policy field which will be discontinued than measures that shall continue.³² Second, the EU lacks the competence to regulate in a wide variety of fields: it only has coordinative competences in promoting social inclusion and reforming social security systems, as long as the latter is not necessary in order to facilitate free movement of persons, and lacks any competence in the field of wages, industrial collective action and collective bargaining. Since the Court of Justice continues to control national level collective action, collective bargaining and policies for social inclusion and social security for internal market compliance, in these fields a deregulatory thrust remains. This mismatch is addressed by the Constitution of Social Governance.

“New economic governance” - a misguided answer to the crisis?

The perceived threat to the European social model is exacerbated by the dynamics of economic and monetary union, which again have been intensified by a package of measures aimed at combating the EU economic crisis. These measures are commonly referred to as “new economic governance”,³³ although this term lacks precision in several dimensions.

European economic and monetary union (EMU), introduced by the 1993 Maastricht Treaty, has been targeted with a two-pronged critique. The more optimist section of the critique focuses on the asymmetry of EMU, as established in Article 119 TFEU and spelled out in the remainder of the Treaty chapter on economic and monetary policy: a single monetary policy coexists with the principle that, on the one hand, there is a single monetary and exchange rate policy as well as the euro as the single currency, while economic policy remains a national responsibility which is coordinated in the council.³⁴ While Member States whose currency is not the Euro are bound by the

³² European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2015: A New Start (COM (2014) 910 final)*, Annexes 1-3

³³ See, for example, K Armstrong, 'The new governance of EU fiscal discipline', *European Law Review*, 38 (2013), 601-17; by contrast, J Zeitlin and B Vanhercke, *Socialising the European Semester? Economic Governance and Social Policy Coordination in Europe* (Stockholm: SIEPS, 2014) refer to socio-economic governance.

³⁴ This chapter does not offer sufficient space to fully evaluate EMU. For an overview from the perspectives of political economy see A Verdun, 'The European Currency in Turbulent Times - Austerity Policy in Brussels as the only way out?', in D Schiek (ed) *The EU Economic and Social Model in the Global Crisis. Interdisciplinary Perspectives* (Farnham: Ashgate, 2013), pp. 45-70, P Arestis, G Fontana and M Sawyers, 'The Dysfunctional Nature of the Economic and Monetary Union', in the same edited collection, pp. 23-44; for an evaluation from a legal-comparative perspective see Ulla Neergaard, Catherine Jacqueson and Jens Hartig Danielsen *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU. The XXIV FIDE Congress in Copenhagen 2014* (Copenhagen: DJOF, 2014), for an evaluation under the perspective of European integration strategies see S Fabbrini, *After the Euro Crisis. A New Paradigm on the Integration of Europe* (Oslo: ARENA Centre for European Studies, 2014).

commitment to price stability as the main aim of monetary policy, the impact is more severe in Member States whose currency is the Euro. These lose the opportunity to devalue their currencies, which leaves mainly labour costs and social policy measures as means to counteract economic crisis through internal devaluation.³⁵ This has led to the expectation that the EU's common social policy would be 'sacrificed on the altar of the common currency'.³⁶ These concerns were reaffirmed by the EU's institutions' reactions to the EU currency crisis, which again resulted from a global economic crisis triggered by irresponsible banking and real estate markets in the US and some EU Member States. These measures are now evaluated as resulting in the structural dismantling of the European Social Model.³⁷

The term "new economic governance", by which these measures are usually referred to, is arguably of the euphemisms of EU policies. "New governance" as initially defined³⁸ refers to replacing top down government by governance based on interactive bottom-up and top-down processes and interaction of state governments with socio-economic actors. In the EU, it was associated with the open method of coordination, which promised a way to overcome the dead end of EU social policy between reluctance of Member States to commit and increasing deregulatory impact of the internal market.³⁹ Many had expected that civil society at large or at least those being affected by specific regimes would be able to participate in EU level new governance.⁴⁰

As new **economic** governance, new governance has grown into its original ambit: the EU Treaties first introduced elaborate combinations of top down and bottom up processes for the coordination of economic policy (now Articles 120-126 TFEU). "New economic governance" refers to the recent attempts to achieve stricter coordination and convergence of economic policy, and thus to overcome the asymmetry of Economic and Monetary Union. It relies on a technocratic style of governance, in that new

³⁵ For an overview with hindsight see J Grahl and P Teague, 'Reconstructing the eurozone: the role of EU social policy', *Cambridge Journal of Economics*, 37 (2013), 677-92

³⁶ C Hay, 'Contemporary Capitalism, Globalisation, Regionalisation and the Persistence of National Variation', *Review of International Studies*, 26 (2000), 509-31, M Panić, 'The Euro and the Welfare State', in *social welfare and eu law*, ed. by M Dougan and E Spaventa (Oxford: Hart, 2005), pp. 25-44.

³⁷ Ch Hermann, 'Crisis, structural reform and the dismantling of the European Social Model', *Economic and Industrial Democracy*, 2014, 1-18, D Vaughan-Whitehead, as in footnote 26.

³⁸ See for example D M Trubek and L Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', *European Law Journal*, 11 (2005), 343-64 and Jonathan Zeitlin, *Social Europe and Experimentalist Governance: Towards a New Constitutional Compromise?* (Mannheim: EUROGOV 2005, available at <http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/wp/pdf/egp-connex-C-05-04.pdf>).

³⁹ See, for example D Ashiagbor, *The European Employment Strategy* (Oxford: Oxford University Press, 2005), M Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge: Cambridge University Press, 2011), M Heidenreich and J Zeitlin (eds) *Changing European Employment and Welfare Regimes: the Influence of the Open Method of Coordination on National Reforms*, (New York: Routledge, 2009).

⁴⁰ The literature on governance is too wide to be referenced in full here. For an introduction see D Levi-Faur, 'From "Big Government" to "Big Governance"?', in idem (ed) *The Oxford Handbook on Governance*, (Oxford: Oxford University Press, 2012), pp. 29-44. As well as the chapters in that edited collection.

economic governance is based on surveillance of Member States performance to certain targets. This comprises three fields: fiscal surveillance focused on budget stability and containment of government debt,⁴¹ macroeconomic surveillance striving to contain imbalances in the Eurozone and beyond by paying attention to external and internal processes that may impact on the stability of national economies⁴² and finally coordination of socio-economic policy (based on Articles 121 (2) and 148 (2) TFEU).⁴³ It also comprises specific measures in cases where Member States can no longer serve their government debt and apply for assistance by the EU or the IMF or both – this is now the ambit of the ESM, which has partly reintegrated into the EU framework.⁴⁴ In this last branch, the governance is established through contractual agreements (“Memoranda of Understanding”), originally drafted by the Member States on the one hand, and the EU Commission, the European Central Bank and the IMF on the other hand, but enforced under enormous pressure since fulfilment of these memoranda is a precondition for receipt of financial support.

For the purpose of this chapter, a short overview of the regular procedures is fully sufficient. The EU Commission and Council, partly in conversation with the Member State affected, define targets, often quantifiable, and the Member States respond by developing measures to achieve these targets. If these targets are not met, the lack of enforceability before courts is compensated addressed by the so called corrective arms of the new governance instruments.⁴⁵ Member States may have to make non-interest bearing deposits, interest bearing deposits or pay fines.⁴⁶ The TSCG adds some more instruments for effectiveness, such as partnership programmes (Article 5) imposing “structural reforms” on Eurozone countries under an excessive deficit procedure, further specified by regulation 473/2013 TFEU (Article 9).

The whole process is coordinated through the European Semester, which has been given a legal base in the preventive arm of the Stability and Growth Pact (SGP1).⁴⁷ Originally, the European Semester only ran from January to July (hence the term “semester”). The Commission’s Annual Growth Report (AGR) in January is followed by the European Council’s adoption of Guidance for national policies in March, which is re-

⁴¹ Articles 126 TFEU, Protocol (No 12) on the excessive deficit procedure [OJ (2008) L115/279], Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, last amendment by Regulation (EU) No 1175/2011 of the Parliament and the Council [OJ (2011) L306/12] – Stability and Growth Pact 1.

⁴² Regulation (EU) No 1176/2011 of the European Parliament and the Council on the prevention and correction of macroeconomic imbalances [OJ (2011) L306/25] and Regulation (E) 1174/2011 of the European Parliament and the Council on enforcement measures to correct excessive macroeconomic imbalances in the euro area [OJ (2011) L 306/08].

⁴³ For more detail see A de Streel, ‘The Evolution of the EU Economic Governance since the Treaty of Maastricht: An Unfinished Task’, *Maastricht Journal of European and Comparative Law*, 20 (2013), 336-62.

⁴⁴ Regulation (EU) No 472/2013 of the European Parliament and the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [OJ (2013) L 140/1].

⁴⁵ Article 3 (4a) of Reg 1467/97 as amended by Regulation 1175/2011 (SGP 2).

⁴⁶ Regulation 1173/2011 Articles 4-6 and 8.

⁴⁷ Council Regulation 1466/97, as amended by Regulation 1175/2011 (SGP1).

flected upon at national levels in April, only to be followed by the Commission's draft for Country Specific Recommendations in May and their endorsement by the European Council in June. As an institutional response to public protests against post-crisis austerity measures,⁴⁸ a "social dimension" has been added,⁴⁹ which expanded the semester into a nine-month process: preceding the AGR, there is now a Tripartite Social Summit (see Article 152 TFEU) in October, an additional macroeconomic dialogue in November and another EU level macroeconomic dialogue and Tripartite Social Summit in February and March.⁵⁰ Nevertheless, nine months seem very short for realising any ambition to initiate mutual learning processes. There is one month (May) for the participation of national parliaments, and another one (April) for national social partner involvement, while the EU level social dialogue takes place in November. The European semester remains a top-down process, and it remains to be seen whether the envisaged improvements will fundamentally change its procedural flaws.

Normatively, the EU's social values apply to economic and monetary union: article 119 TFEU, the initial article of the chapter on EMU, refers to article 3 TEU and thus to social justice and the social market economy, though it also stresses the principles of an open market economy and free competition and establishes the primacy of price stability. Further, the employment chapter relates to the objectives of Article 3 TEU primarily by reference to promoting a skilled and adaptable work force. The question, which is as yet unanswered, is whether the "new economic governance" in promoting and enforcing EMU can be reconciled with the EU's social values substantively. This can be doubted since the dynamics resulting from new economic governance as management by objectives are coupled with the macro-economic structure engrained in the legal frame of the common currency. Without any official monetary adjustment facility, and primarily bound to price stability and containment of government debt, any adjustment to cyclical shocks is difficult. As a further complication, that adjustment is left to the Member States, which have little choice than reverting to manipulating wage levels and adjusting social expenditure. The common currency is thus based on the perception of a multitude of national economies – in contrast with the internal market, which is based on the gradual elimination of borders in the socio-economic sphere. "New economic governance" allows the EU to actively influence national social policies and wage levels within Member States in order to achieve such adjustment. The time honoured principle of progressively harmonising living and working conditions in an upward trajectory is being sacrificed in favour of differentiation.⁵¹ In particular, differentiation of national social policy is imposed in response to cyclical shocks which impact differently on Member States with different economies. The shift in relation between Europe's societies and the subset of economic integration is profound: while in the internal markets national societies are justified in holding up values against market integration as long as this does not result in (re-)establishing

⁴⁸ J Zeitlin and B Vanhercke (2014), as in footnote 33, at 62, using the softer term "discontent".

⁴⁹ Idem.

⁵⁰ See EU Commission, *Strengthening the Social Dimension of the Economic and Monetary Union COM (2013) 690 final* (Brussels: European Union, 2013) (pp. 12, 18).

⁵¹ C Degryse, M Jepsen and Ph Pochet, *The Euro crisis and its impact on national and European social policies* (Brussels: European Trade Union Institute (ETUI) working paper 2013. 0 5, 2013).

national borders at different levels, in the EMU national societies are required, under threat of fines and payments, to differentiate and lower protection levels.

Is there any way out of here? A humane EU through a constitution of social governance

A structural deficit in EU governance procedures

The dynamics unleashed by the practical application of the internal market through the Court of Justice and the initiation of “new economic governance” by the EU institutions as a response to the shortcomings of EMU point to a deeper problem, which needs to be addressed at a conceptual level. It is suggested that both processes illustrate the difficulty of developing EU level rules that would overcome the economic bias of the EU’s governance as they emerged in both dimensions.

The notion of governance is used here in a wide sense, as encompassing any activity aimed at giving direction to society, including economy, maximizing cooperation with those who are being governed.⁵² The complexity of governance is exacerbated by the multiple governance levels of the Union, Member States, regions and municipalities. Accordingly, a mix of governance styles is needed to achieve any of the EU’s objectives,⁵³ moving on a continuum between hierarchy and markets,⁵⁴ involving hybrid forms and different modes of cooperation often labelled ‘new governance’ or ‘soft law’.⁵⁵ This wide conception allows to characterise the Court’s activity as judicial governance. This form of governance gives direction to societies and economies in the EU by developing authoritative guidance. Just as the directly effective law of the EU, this governance is strictly hierarchical. On the other end of the spectrum, forms of negotiated governance, often referred to as new governance, involve governing through discourse and agreement between those capable of reverting to hierarchical governance. Governance by incentives, as used in the so called “new economic governance”, constitutes a hybrid between hierarchical and negotiated governance. Governance as a notion is neither positive nor negative⁵⁶ – it can be undemocratic, coercive and illegitimate, as well as humane, participative and innovative.

⁵² See for a similar notion V Benáček, 'Three Dimensions of Modern Social Governance: Markets, Hierarchies, Kinship', in A Rosenbaum and J Nemec (eds) *Democratic Governance in the CEES*, (Bratislava: NISPAcee Publisher, 2006), 407-28. and H Schepel, *The Constitution of Private Governance* (Oxford & Portland: Hart, 2005).

⁵³ D M Trubek and L Trubek, (as footnote 38), T Börzel, 'The European Union - a Unique Governance Mix?', in D Levi-Faur (ed) *The Oxford Handbook on Governance*, (Oxford: Oxford University Press, 2012), pp. 639-52.

⁵⁴ D Levi-Faur, as in footnote 40, at 31-32.

⁵⁵ A Peters, 'Soft Law as a New Mode of Governance', in U Diederichs, W Reiners and W Wessels (eds) *The Dynamics of Change in EU Governance*, (Cheltenham: Edward Elgar, 2011), 21-51, at 21.

⁵⁶ By contrast, some author use the term governance as synonym with Foucauldian governmentality, thus using it as a negative notion describing how the EU “new economic governance” neglects European Social Rights (see A Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?', *German Law Journal*, 15 (2014), 1145-76, at 1150-51).

Re-nationalising of social policy?

The dominant proposition for a way out of these dilemmas is to demand the renationalisation of social policy. The left-wing critique of the EU's bias in favour of economic actors now alleges that the EU is at a point of no return, and structurally unable to recouple European integration and EU level social integration. As a logical consequence, social policy must be left to the national level, and protected at that level. These authors consider, for example, that there can be no "labour constitution" at EU levels except for a fundamental norm demanding that "the labour constitutions of the member states remain autonomous" which again means that there must not be a comprehensive body of EU level labour law⁵⁷, or that EU welfare states can at best be nested, i.e. coordinated - any EU level of the main social insurance branches established in Continental Europe should not even be aspired.⁵⁸ This EU level discourse finds its equal in a global discourse where some authors call for reestablishment of embedded liberalism.⁵⁹ These voices would suggest that there is no need to pursue EU level regulatory social policy. All that is required is that the EU leaves the Member States alone in how they generate their own social (or labour) constitutions.

Ironically, as has been shown above, the strategy of the EU institutions and its Member States for overcoming the economic crisis has some common ground with these demands. Instead of approximating national law and policies, the new economic governance has at times encouraged Member States to pursue diversification and differentiation. While the guidelines encourage wage growth in some Member States, they preach wage restraint in others, for example.⁶⁰

However, the eventual success of this diversification is highly questionable. Embedded liberalism failed for the specific reason that economic integration is not separable

⁵⁷ F Rödl, 'The labour constitution of the European Union', in R Letelie and A Jose Menendez (eds) *The Sinews of European Peace. Reconstituting the Democratic Legitimacy of the Socio-Economic Constitution of the European Union*, ed. by (Oslo: ARENA, 2009), pp. 367-426 (407-12).

⁵⁸ M Ferrera, 'Modest Beginnings, Timid Progresses: What Next for Social Europe?', in B Cantillon, H Verschueren and P Ploscar (eds) *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy*, (Cambridge, Antwerp: Intersentia, 2012), pp. 17-39., idem as in footnote 25.

⁵⁹ A Bieler, J Hilary and I Lindberg, 'Trade Unions, Free Trade and the Problem of Transnational Solidarity: An Introduction', *Globalizations*, 11 (2014), 1-9, see also by the same authors 'Conclusion: Towards Transnational Solidarity on 'Free Trade' Policy?', *Globalizations*, 11 (2014), 155-64.

⁶⁰ The detailed evaluation of "new economic governance" in the European Semester is beyond the ambit of a single article or paper. The ETUI has delivered a comprehensive evaluation of the Country Specific Recommendations in relation to social policy, broadly conceived S Clauwaert, *The country-specific recommendations (CSRs) in the social field* (Brussels: European Trade Union Institute, 2013), idem *The country-specific recommendations (CSRs) in the social field. An overview and comparison - update including the CSRs 2014-2015* (Brussels: ETUI, 2014); for a detailed analysis of only the 2013 CSR see S Bekker, *European socioeconomic governance in action: coordinating social policies in the third semester* (Brussels: OSE, 2015). The national constitutional critique of the Memorandums of Understanding and their impact on national social and welfare systems is analysed by C Kilpatrick and B de Witte (eds) *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges* (Florence: European University Institute, 2014), also published as special issue of *European Social Law* (1/2014).

from the social sphere in principle. The integration of markets will always posit territorially constrained social policy regimes against each other: if labour can be sourced cheaper in certain corners of an integrated market that is where labour intense production of goods and services will move, while those services and goods which require highly qualified and appropriately paid labour will be generated elsewhere, in highly capitalised regions where also highly educated persons are available and in a position to engage in the related innovation. Labour markets are markets too in a market economy, and easing free movement to such a degree that it does not lead to losses and partial social disintegration (as it presently does) will contribute to alleviating social misery resulting from unemployment generated in the wake of this. Conversely, the state-based and state-funded provision of high-quality living conditions will only be affordable in such Member States where the conditions described above prevail, and state budgets profit from tax revenue derived from a stable surplus. Defending territorially constrained social rights will thus not do justice to EU citizens in those Member States whose economy is focused on agriculture, low-qualified services and not on exporting complex industrialised goods: those economies cannot hope to produce the constant trade surplus which enables Member States such as Germany and Finland to maintain high level welfare compromises within a common currency area.⁶¹

Accordingly, without denying the value of diversity, some EU level activity to achieve socio-economic upward movement is needed.

EU level legislation

Alternatively, there are presently a number of proposals to use the EU competences more expansively. Proposals include actions to align pension and employment systems to ageing populations through using the competence related to age discrimination, a directive on measures providing financial support for those excluded from the labour market or minimum requirements for national unemployment insurances, expanding existing EU employment directives to apply to workers (instead of only employees) and demanding transparency for employers,⁶² as well as legislation for social rights based on the citizenship chapter.⁶³ Further, reforms of the posted workers directive to increase wage levels of posted workers, in particular aligning their rights to the rights of agency workers used within the jurisdiction of a Member State, or to establish legislation addressing the problem of employment relationships based on the on-call principle could be considered, as well as creating specific social security institutions for free moving workers.⁶⁴

However, these proposals would not suffice to address the structural imbalance between the EU's social values and the deregulatory thrust of its internal market, coupled with the structural imbalance of economic and monetary union. The EU institu-

⁶¹ D Schiek, as in footnote 3, at pp. 230-35.

⁶² C Barnard and G de Baere, *Towards a European Social Union. Achievements and Possibilities under the Current EU Constitutional Framework* (Leuven: KU Leuven Euroforum, 2014).

⁶³ D Kostakopoulou, *Co-Creating European Union Citizenship: A Policy Review* (Brussels: European Commission, 2013).

⁶⁴ The latter two proposals could be based on Article 153 TFEU, the former only require reforms of existing directives.

tions do not possess the competences to address issues such as wage imbalance, the establishment of new social insurance branches at EU levels (except if limited to the needs of free moving workers) and the creation of an EU level system of financing higher education, to name just a few examples. Instead of promoting European level social legislation outside the EU framework,⁶⁵ this chapter proposes to interpret the EU legal framework as containing a constitution of social governance by default.

A Constitution of Social Governance

The concept

The notion “social governance” signifies that societal self-regulation should complement EU and state governance. Social governance emerges as the means through which EU level regulation in social policy realms can be achieved without a time-consuming Treaty change or intergovernmental agreements between EU Member States.

The base of this proposal is a systematic interpretation of the EU competence regime in the light of the EU’s values and guiding norms. The apparent lack of all the explicit competences to activate values such as social justice, solidarity and social inclusion does not have to be read as a contradiction in terms.⁶⁶ It is true that the EU legislator cannot regulate wages or industrial collective action (Article 153 [5] TFEU) or an EU wide higher education system (Article 165 TFEU); and doubts have been voiced whether the competence to complement the activities of Member States in the field of social security and social protection for workers allows for the establishment of EU level social security systems.⁶⁷ The question is whether this condemns any European level rules to move outside the field of EU law. On a systematic and dynamic interpretation of European Union law, a different result appears more convincing. The apparent gaps in the EU competence regime cannot be interpreted as excluding any EU level regulation and reserving the social policy fields indicated above for national level regulation. Instead, the rules exempting certain fields, and in particular wage setting and industrial conflict, from the legislative grasp of the EU institutions mirrors a principle common to the Member States. Many member states leave the setting of wages to the two sides of industry, partly on the basis of constitutional guarantees of collective bargaining, industrial action and social partner autonomy. This precludes any EU institutional legislation of the same field as well. Beyond that, attempting to capture all the problems of socio-economic integration by institutional action through the EU channels will most certainly have a smothering effect on transnational societal exchange, which again is the practical precondition for successful EU integration. The apparent lack of competences in the EU socio-economic constitution must thus be read as a

⁶⁵ J Lievens and others, *A Social Compact for a Social Union?* (Leuven : KU Leuven Euroforum, 2014).

⁶⁶ D Schiek (2013), as in footnote 3, at 186, St Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of 'freedom of contract'', *European Review of Contract Law*, 10 (2014), 167-82, at 177.

⁶⁷ In 2013/14 the debate around an EU unemployment insurance was most relevant here, also aiming at finding a way of anticyclical financing (see C Barnard and G de Baere, as footnote 63).

conscious choice in favour of societal rule making or social governance. In a constitutional sense this concept must only include such regulatory activities which are not delegitimised by undue dominance of already powerful economic actors. Not all private governance is thus suitable to be classed as social governance. However, there are numerous options for legitimate governance of non-state actors. Beyond the established models of industrial relations, these include actions by charitable organisations, insurance funds and mutual societies for example engaged in care, or autonomously constituted universities providing quality higher education. Those actors, collaborating in European networks or deciding to found EU level organisations, could also devise EU level rules. The incomplete competence regime established by the EU Treaties can be read to mirror the anti-totalitarian elements of its Member States' constitutions in so far as the EU, as its Member States, leaves scope for societal rule making. In accepting such a constitution of social governance, even beyond EU induced deliberations, the EU constitution would also allow for transnational social integration to emerge from below.

Indications for practical relevance

Practical examples can easily be developed by utilising recent and not so recent case law by the Court as illustration of transnational conflicts where the diverse layers of social integration are less than perfectly aligned.

Self-regulation on transnational labour markets: European trade union freedom

The widely debated Laval quartet⁶⁸ can be viewed as illustrating the complexities of determining employment conditions in multi-layered labour markets from a tip-of-the-iceberg perspective. Three of the four cases (all with the exception of the Viking case) evolved around "posting of workers". The term has come to describe a more and more wide-spread phenomenon: cooperation of business typically involve employed workers, but certain types of economic activity rely on mobile labour traditionally. The transport sector is one example, and the building sector has come to represent another example. In those sectors, labour costs also constitute a major element of the costs of offering services. Mobile labour can be deployed to work in locations away from home, or recruited on the spot. Workers who move away to work would be natural beneficiaries of internal market rights relating to equal treatment in the states where they work temporarily. Their employer would perceive equal treatment of their workers as less beneficial if national wage levels differ, and would desist equal treatment rights if employment conditions in the country where the worker delivers their labour are more advantageous. Posting has been accepted as a way to achieve this: maintaining the legal illusion that the worker who moves has not actually moved, the employer can in principle rely on conditions used at his place of establishment. The Court has insisted that those workers cannot rely on free movement of workers and framed their movement as an expression of their employers' rights to provide services instead,⁶⁹ while accepting numerous justifications for Member States to demand that service

⁶⁸ See above footnote 19.

⁶⁹ Cases C-43/93 Vander Elst [1994] ECR I-3803 , paragraph 21-22; 113/89 Rush Portuguesa [1990] ECR I-1417 paragraph 15.

providers offer some of the basic national conditions to their workers.⁷⁰ This is problematic since the different treatment has entrenched posting as a substitute for free movement, especially in the wake of exceptions to free movement at national level. Once the business model was developed, it has spread across a range of sectors. As a result, posting is now entrenched, and many workers are not given an alternative if they want to move into Western labour markets.⁷¹

The Laval quartet, and in particular the Laval case itself, evolved around trade union strategies responding to such unequal treatment. In 2005, the strategy of the Swedish building workers union was to demand at all costs that posted workers would be paid in line with Swedish collective agreements. As is well known, the staging of successful industrial action to that effect was classified as unjustified violation of the employers' rights to freedom to provide services. In those times, the Swedish trade union arguably assumed a paternalistic position towards the workers posted from Latvia, who were not their members. Times have changed though, since the case – next to providing a starting point for an intense academic debate- also spurred transnational trade union cooperation.⁷²

The facts of the more recent case *Sähköalojen ammattiliitto*⁷³ are an example for such development: Polish workers who were posted to Finland on a long-term basis were members of the relevant Finnish trade union. That trade union subsequently offered the service of claiming outstanding pay claims for the workers, since Finnish law allows for workers to cede their claims to a trade union. The dispute evolved around substantial elements of pay such as being paid in line with qualification and experience. In this case, the Court not only accepted that differentiated wages and wage supplements had to be paid to posted workers under EU legislation, but also recognised that the trade union in the host state could perform services for posted workers. This also implies that posted workers have the right to join a trade union in the state where they perform their work. Rights to join a trade union in the host state have traditionally been one element of free movement of workers. Speaking in a more principled way, one could state that the CJEU acknowledges a subject status for posted workers in this case.

This case constitutes a good starting point for expanding on the concept of a constitution of social governance. It aptly illustrates the potential of transnational activities which could result in EU level rules not emanating from the EU institutions them-

⁷⁰ The requirement to pay a statutory minimum wage was accepted (C-369/96 *Arblade & Leloup* [1999] ECR I-8453, C-164/99 *Portugalia Construcções* [2002] ECR I-787), as well as demanding social security payments for wage continuation during work stoppage due to winter weather (case C-272/94 *Guiot* [1996] ECR I-1905) or to secure annual holiday pay (case C-490/04 *COM v Germany* [2007] ECR I-6095) and the requirement to provide surety for workers' wages (case C-60/03 *Wolff & Müller* [2004] ECR I-9553).

⁷¹ Bertelsmann Stiftung, (2014) *Harnessing European Labour Mobility* (Gütersloh: Bertelsmann Stiftung, 2014) (pp. 59, 74)..

⁷² K Lovén-Seldén, 'Laval and Trade Union Cooperation: Views on the Mobilizing Potential of the Case', *International Journal on Comparative Labour Law and Industrial Relations*, 30 (2014), 87-104.

⁷³ C-396/13, ECLI:EU:C:2015:86.

selves. Obviously, the problem which underlies this case cannot be solved by case law, nor by agreements and rules elaborated only in Finland. The posted workers will, in all likelihood, return to Poland at some point, if only temporary. It is at this point that they would need additional protection, should their success in securing adequate wages while in Finland be sustained. If no additional regulatory framework is in place, the Polish employer could claim the wages which were won before Finnish courts back from the workers. Since ceding of claims to trade unions is not accepted in Poland, such claims would in all likelihood succeed. Accordingly what is gained in the territory of one state may be lost in the other again. Once again, territorial approaches are unsatisfactory in the reality of free moving EU citizens. Transnational agreements could offer more suitable solutions. For example, an EU level collective labour agreement in the construction industry could provide rules on equal treatment of posted construction workers, specifying the parameters for equal treatment of posted workers in the host states. Given the privileges the EU legislator has bestowed on employers who post, achieving such an agreement might take several steps. One step towards an agreement to full equal treatment could consist in an agreement on protecting the payments of workers after their return to their home state. In relation to EU level collective agreements, the legal arguments in favour of their acceptance can be supported by reference to the Treaties' specific framework on social partner agreements, which is not the focus of this article.⁷⁴ The advantage of a constitution of social governance should be seen in the option to develop such agreements for certain sectors, and also between a faction of trade unions and employers' associations which have a specific interest in such rules. The construction sector has been identified as one sector where an overlap in interest of management and labour regarding the posting phenomenon might emerge.⁷⁵ There is no reason to not consider sectoral agreements, possibly only covering the most affected countries, as a legitimate start for EU level regulation between management and labour.

Once management and labour agree, the Court of Justice might constitute a barrier for success for such agreements. As in the Laval case, a stray employer who does not feel comfortable with the overall agreement or its enforcement can avail themselves of the Court's support if the case law remains unchanged. As elaborated else-where, there are a number of options for the Court to take a new approach to the realities of collective bargaining in an economic area without frontiers, relying on the Charter of Fundamental Rights and the enhanced relevance of the ECtHR case law from 2009.⁷⁶ To summarise these, the Court would have to perceive of collective bargaining agree-

⁷⁴ On this see D Schiek, 'Europäische Kollektivvereinbarungen (European Collective Agreements)', in W Däubler (ed) *Tarifvertragsgesetz. Kommentar*, (Baden-Baden: Nomos, 2012a), 268-322; idem 'Autonomous Collective Agreements as a Regulatory Device in European Labour Law: How to Read Articles 139 EC', *Industrial Law Journal*, 34 (2005), 23-56, and also P Syrpis, 'Reconciling Economic Freedoms and Social Rights - The Potential of Commission v Germany (Case C-271/08, Judgment of 15 July 2010)', *Industrial Law Journal*, 40 (2011), 222-29, A Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR', *Utrecht Law Review*, 9 (2013), 104-17.

⁷⁵ A Afonso, 'Employer Strategies, cross-class coalitions and the free movement of labour in the enlarged European Union', *Socio-Economic Review*, 10 (2011), 705-30.

⁷⁶ D Schiek (2013) as footnote 3.

ments and the related threat with collective action as normal phenomena in a democracy. This would prevent the Court from classifying the threat with collective action, mutual trade union support and the resulting collective agreements as a restriction of cross-border economic activity.

Developing a European higher education sector from below?

Beyond the field of creating an adequate system of labour relations and collective agreements on wages and other central employment conditions, the legal terrain for the constitution of social governance becomes more complex. There is no precise Treaty norm with privileges the cooperation of actors other than management and labour producing EU level rules. However, this does not mean that there can be no EU level cooperation between societal actors other than management and labour. Accordingly, the constitution of social governance is not merely a new way of legitimising EU level collective bargaining, collective agreements and collective industrial action. It can be much more.

The value basis for the constitution of social governance beyond regulatory and other relations of management and labour remains the same: a number of the EU's objectives in the social realm do not correspond to a full set of EU competences. As recognised in Article 9 TFEU,⁷⁷ the EU's objectives such as full employment, social progress, social inclusion, social justice and social protection, as proclaimed in Article 3 (3) TEU, require among others, a high level of education. Nevertheless, the EU only has coordinative competences in combating social exclusion and the general modernisation of social protection systems (Article 153 (2) TFEU) and higher education (Article 6 (e) TFEU). For both fields, the literature discusses as options for EU level policies coordination of national policies, partly with involvement of civil society in an advisory capacity, intergovernmental cooperation beyond the EU and the impact of EU integration through law emanating from the law of the internal market.⁷⁸ Accordingly, we expect that the dynamic interaction of judicial competences in enforcing the internal market, diverging national preferences and the lack of EU competences leads to disruption of functional policy making in these fields. The question is how social governance can be instituted without strong institutional support in these fields? The question goes beyond civil society participation in devising EU politics, which has been widely researched⁷⁹ and initiated a number of "NGO's" with their registered office in Brussels whose sole purpose is to influence the EU institutions, above all the EU Com-

⁷⁷ According to that provision, the EU shall, in defining its policies and activities, "take into account requirements linked to a high level of employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and protection of human health".

⁷⁸ See for the field of combating social exclusion K Armstrong, 'The new governance of EU fiscal discipline', *European Law Review*, 38 (2013), 601-17, for the field of higher education S Garben, *EU higher education law: the Bologna Process and Harmonisation by stealth* (Alphen aan den Rijn: Kluwer, 2011).

⁷⁹ A literature overview is provided by E Heidbreder, 'Civil Society Participation in EU Governance', *Living Reviews in European Governance*, 7 (2012) "<http://europeangovernance.livingreviews.org/Articles/lreg-2012-2/download/lreg-2012-2Color.pdf>" ; for a critical evaluation see B Kohler-Koch and Ch Quitkat (eds) *De-Mystification of Participatory Democracy. EU Governance and Civil Society* (Oxford: Oxford University Press, 2013).

mission.⁸⁰ It rather seeks to find ways for non-governmental creation of EU level policies which can serve as a bridge over the gap illustrated above.

The higher education sector is a good field for experimental exploration in this regard. The Court's case law in on equal treatment rights of free moving workers and their children as well as non-economically active EU citizens has tackled the unequal treatment of students all over Europe in relation to study fees. Again, the higher education sector is characterised by a high degree of diversity concerning the cost of studies: in some Member States universities can charge very low fees, while in others fees for individual students have reached considerable heights. The fee regimes are complemented by national rules on support payments, which partly counterbalance the fees. In addition, in many Member States there are private universities, which partly operate different fee regimes. The diversities are compounded by differences in accessibility, especially for certain degrees. All this leads to a growth in comparison instruments,⁸¹ and to movement of students to universities in other countries. The Court of Justice has heard a number of cases on this field, and developed a plethora of principles. Students who move to another Member State to study must not be discriminated against by the requirement of paying higher fees than nationals,⁸² and Member States must not restrict the number of EU foreigners accepted for study.⁸³ However, unless students are workers at the same time,⁸⁴ they can be excluded from maintenance grants, which in practice alleviating the fee burden, as long as they have not developed a sufficient link to their host state.⁸⁵ Further, the home state of any student

⁸⁰ See for example European Network of Foundations for Social Economy [HYPERLINK "http://www.pefondes.eu/spip.php?page=article&id_article=15&lang=en"](http://www.pefondes.eu/spip.php?page=article&id_article=15&lang=en) http://www.pefondes.eu/spip.php?page=article&id_article=15&lang=en ; the EUCLID network [HYPERLINK "http://euclidnetwork.eu/"](http://euclidnetwork.eu/) <http://euclidnetwork.eu/> ; European Association of Higher Education Institutions engaged in professional degrees [HYPERLINK "http://www.eurashe.eu/"](http://www.eurashe.eu/) <http://www.eurashe.eu/>

⁸¹ One of these has even been funded by the EU Commission CITATION EUR14 \I 2057 EURODYCE, *National Student Fees and Support Schemes in European Higher Education* (Brussels: European Commission, 2014).

⁸² First established in case 293/83 Gravier [1985] ECR 593, now specified in Article 24 Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [OJ (2004) L158/88].

⁸³ Cases C-147/03 COM v Austria [2005] ECR I-5969; C-65/03 COM v Belgium [2004] ECR I-6427; C-73/08 Bressol [2010] ECR I-2735.

⁸⁴ Students who are also workers must be treated equally in every aspect of access to higher education, including access to maintenance grants (the case C-46/12 L.N. (ECLI:EU:C:2013:97) confirmed this longstanding principle once again, while the case C-20/12 Giersch (ECLI:EU:C:2013:411) seems to impose some restrictions for children of frontier workers, who must satisfy a "sufficient link" criterion to avoid discrimination. EU legislation seems to suggest that such discrimination is not allowed – see Article 7, 8 Regulation (EU) No 492/2011 of the European Parliament and the Council on freedom of movement of workers within the Union [OJ (2011) L 141/1]. On the spill-over effects of directly effective EU law on national higher education policy see also A. Gideon 'The Position of Higher Education Institutions in a Changing European Context: An EU Law Perspective' (2015) *Journal of Common Market Studies* (on-line first, DOI: 10.1111/jcms.12235).

⁸⁵ Cases C-184/99 Grzelczyk [2001] ECR I-6193, C-209/03 Bidar [2005] ECR I-2119; C-158/07 Förster [2009] ECR 663 have progressively raised the stakes for free moving students to access maintenance grants. These have now been codified in Article 24 Directive 2004/38.

must not place them in a detrimental situation because they seek to study in other Member States.⁸⁶ As some of the cases cited illustrate, the incentives for students to migrate to other Member States may be particularly strong if these Member States offer studies in easily accessible languages. The movement of students is uneven between Member States. For universities, this may create disincentives to participate in exchange programmes, which again may be detrimental not only for those students who aspire to study abroad, but also for those who do not move and have a less international experience due to lack of incoming students. All this cries out for systematic EU level regulation which goes beyond complementing the rights of free moving workers and EU citizens. However, the EU does not have the competence to harmonise national laws (Article 165 TFEU). Can societal regulation fill this void?

While this sector is considerably more determined by state regulations than wage setting, in many Member States universities have an independent or even fully autonomous status. This could be the basis for establishing agreements containing rules on how to alleviate disruptions resulting from the different regimes. For example, universities could agree on establishing cooperation regimes which install systematic observation of burdens incurred by students moving between those universities, specific information regimes for staff and students and possibly even provide for payments in the case of a sustained imbalance of demand for study places. Such rules are beyond the regulatory capacity of the EU, although higher education could well be perceived as a social service as important as health care or pensions. As mentioned, there is no EU Treaty competence to create such legislation by way of harmonising national laws. This poses the question in how far higher education institutions can create contractual networks overcoming the disruption caused by the impact of internal market and EU Citizenship law on the sector. Cooperation between higher education institutions is not unknown. Next to younger initiatives which limit their activities to loose cooperation and the production of policy papers,⁸⁷ there are also more concrete cooperation structures. In some border regions higher education institutions from different member states deliver common higher programmes and research activities, based on contractual regimes under national law with the appropriate consent of national authorities.⁸⁸ These are often linked to regional co-operations on the basis of the European Grouping of Territorial Cooperation,⁸⁹ created on the basis of Article 175 TFEU. Furthering social governance in the education sector could possibly be eased by creating a similar regulation on the basis of Article 165 TFEU. Such a regulation would not institute harmonisation of national laws, but only create options for Europeanisation by

⁸⁶ Cases C-11, 12/06 Morgan and Bucher (ECLI:EU:C:2007:626), C-523,585/11 Prinz and Seeberger (ECLI:EU:C:2013:524), C-220/12 Thiele Meneses (ECLI:EU:C: 2013:683) and C-275/12 Elrick (ECLI:EU:C:2013:684).

⁸⁷ The League of European Research Universities can be quoted as an example (see <http://www.leru.org/index.php/public/home/>, visited 28 May 2015).

⁸⁸ See for example the European Cooperation between Universities of the Upper Rhine Region (EUCOR), at <http://www.eucor-uni.org/> (last visited 28 May).

⁸⁹ Regulation 1082/2006/EC as amended by Regulation EU 1302/2013 OJ L347/303. On the practical workings of this instrument from a European Integration theory perspective see Elisabetta Nadalutti, *The Effects of Europeanization on the Integration Process in the Upper Adriatic Region* (Cham, Heidelberg, New York, Dordrecht, London: Springer, 2015).

universities. It would thus not overstretch the legislative base. In the meantime, higher education institutions could expand contractual arrangements beyond regions, establishing reciprocity in student exchange as well as stable research co-operations.

While this road to a constitution of social governance is much less well paved than in the labour relations field, it is not impossible that it proceeds with time. As in the labour relations field, its legitimacy depends on providing institutions for negotiating conflicting interests of academics, students and the wider socio-economic environment of higher education institutions. Social governance is also negotiated governance, and that negotiation must occur in structures ensuring social justice procedurally and substantially. Developing those principles for new fields such as higher education is certainly a worthwhile endeavour.

Conclusion

The expansion of the values and objectives the EU strives to realise and achieve without a correlative expansion of its competence base may appear as an indissoluble enigma.⁹⁰ It may also be read as the basis for a constitution of social governance. Such dynamic interpretation of the EU Treaties would not seem more innovative than many of the interpretations delivered by the Court of Justice, ranging from direct effect of Treaty provisions to developing economic freedoms such as freedom to provide services and freedom of corporate establishment into a Charta for business. It would complement these developments in such a way that the EU socio-economic constitution could live up to the challenges of humaneness. For the social policy realm broadly conceived as including employment rights, social inclusion policies and higher education, such humaneness can be achieved by accepting institutions which allow self-regulation of societies while at the same time guaranteeing procedural and substantive justice. The time honoured categories of industrial democracy have progressively been integrated into the EU Treaties, starting with the Treaty of Amsterdam. For other emanations of social governance, secondary law might be a route forward, if socio-economic actors should not be thrown back on national law institutions. In any case negotiated governance as social governance is a way to enhance the humaneness of the EU.

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⁹⁰ S Weatherill (as footnote 67).

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